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In the Supreme Court of the United States

OCTOBER TERM, 1991

CITIBANK, N.A., PETITIONER

v.

WELLS FARGO ASIA LIMITED

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, in the absence of an agreement to the contrary, a federally chartered and insured bank may be held liable for deposits placed with its branch in a foreign country when the foreign government prevents the branch from repaying those deposits.

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioner Citibank, N.A. (Citibank) seeks review of a decision, issued on remand from this Court, affirming a district court's judgment that Citibank's New York office is obligated to repay two dollar-denominated deposits that respondent Wells Fargo Asia Ltd. (WFAL) placed with a Citibank branch located in Manila, Republic of the Philippines. Citibank contends, as did the United States as amicus curiae below, that in the absence of an agreement to the contrary, Citibank's home office is not obligated to repay deposits placed with its branch in a foreign country when the foreign government prevents the branch from repaying them.

1. Congress has authorized federally chartered national banks (U.S. banks) to establish foreign branches "for the furtherance of the foreign commerce of the United States, and to act if required to do so as the fiscal agents of the United States." See Federal Reserve Act, 12 U.S.C. 601 *et seq.*; 12 C.F.R. Pt. 211. A U.S. bank wishing to establish a foreign branch must seek permission from the Board of Governors of the Federal Reserve System (Federal Reserve Board) to operate the branch "upon such conditions and under such regulations as may be prescribed by the said board." 12 U.S.C. 601. See 12 C.F.R. 211.3(a).[1] A foreign branch of a U.S. bank is subject, of course, to local laws and regulations that may impose additional restrictions on its operations.[2]

A U.S. bank normally is responsible for the ultimate solvency of its foreign branches, which are "office[s]" of the bank. 12 C.F.R. 211.2(k). See 3 Fed. Res. Bull. 198 (1917); see also Basle Concordat (May 1983), *reprinted in* 22 Int'l Legal Materials 901 (1983). Nevertheless, the United States requires that a U.S. bank "shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office." 12 U.S.C. 604. See also H.R. Rep. No. 69, 63d Cong., 1st Sess. 30, 74 (1913).

In addition, the United States has drawn distinctions between a U.S. bank's foreign and domestic deposits that are critical to the federal regulatory scheme. For ex-

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[1] The Federal Reserve Board also approves the establishment of foreign branches of state-chartered banks that are members of the Federal Reserve System. See 12 U.S.C. 321. In addition, the Federal Deposit Insurance Act requires state-chartered banks that are not members of the Federal Reserve System to seek approval from the Federal Deposit Insurance Corporation (FDIC) before establishing foreign branches. See 12 U.S.C. 1828(d)(2).

[2] The major industrial nations have formulated general guidelines describing the regulatory responsibilities of the home country and the host country. See Basle Concordat (May 1983), *reprinted in* 22 Int'l Legal Materials 901 (1983).

ample, Congress has dictated that federally imposed reserve requirements on deposits "shall not apply to deposits payable only outside the States of the United States and the District of Columbia." 12 U.S.C. 461(b)(6). This exemption, which was codified in 1980, reflects a Federal Reserve Board practice dating back to 1918. See H.R. Rep. No. 263, 96th Cong., 1st Sess. 10 (1979); 125 Cong. Rec. 19,671 (1979); 12 C.F.R. 204.1(c)(5), 204.128; 35 Fed. Reg. 2768 (1970); 4 Fed. Res. Bull. 1123 (1918). "The exemption is intended principally to enable foreign branches of U.S. depository institutions to compete on a more nearly equal basis with banks in foreign countries in accordance with the laws and regulations of those countries." 12 C.F.R. 204.128(c).[3]

The statutory distinction between deposits "payable only outside the United States" and deposits that are payable (and hence "collectible") here has led to the development of the "Eurodollar" market. Federal reserve requirements and deposit insurance assessments increase the costs to banks of acquiring deposits. Financial institutions that accept deposits free from reserve requirements and insurance assessments can achieve savings in obtaining funds. See R. Dale, *The Regulation of International Banking* 12-13 (1984). U.S. banks are able to obtain dollar-denominated deposits abroad on an equal par with foreign banks, free from United States reserve requirements and insurance assessments (and are able to compete with foreign financial institutions in the international money markets) because they accept dollar-denominated funds at their foreign branches that are

[3] Similarly, for more than 50 years, Congress has exempted from FDIC insurance assessments and coverage those deposits "payable only at an office * * * located outside of the States of the United States." 12 U.S.C. 1813(*l*)(5)(A). Furthermore, when Congress or the Federal Reserve Board has imposed interest rate, payment, and advertising limitations on deposits, it generally has provided that such limitations shall not apply to deposits payable only abroad. See 12 U.S.C. 371a, 371b; 12 C.F.R. 217.1(c)(2); 21 Fed. Res. Bull. 862, 863 (1935).

legally "payable only" at the foreign branch. See 12 C.F.R. 204.128(c). Thus, the regulatory exemptions provide a forceful "stimulus" and "the basic inducement" for U.S. banks to participate in the Eurodollar market. See R. Dale, *supra*, at 12, 14, 23.

The United States' regulatory exemptions impose an essential condition on Eurodollar participation: the foreign branch deposit *must* be "payable only" abroad. A foreign branch deposit that lacks that essential feature receives the same regulatory treatment (and incurs the same associated costs) as a domestic dollar deposit. See 12 C.F.R. 204.128(c). Thus, the distinctive characteristic of a Eurodollar deposit is its place of payment—and its consequent freedom from reserve requirements and insurance assessments. Indeed, international bankers and commentators generally *define* Eurodollars as dollar-denominated deposits that have their situs outside the United States.[4]

2. Citibank currently operates a foreign branch office in Manila, the Republic of the Philippines (Citibank/Manila). Although Citibank/Manila obtains funding from Philippine depositors, it also obtains a portion of the funds needed for lending through Eurodollar deposits. Thus, in June 1983, a Singapore money broker acting on behalf of WFAL, a Singapore bank owned by Wells Fargo Bank, N.A., placed two Eurodollar deposits with Citibank/Manila. The broker telephoned Citibank/Manila and reached an oral agreement as to the amount of the deposits ($1 million each), the interest rate (10%), and

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[4] See, *e.g.*, E. Roussakis, *Commercial Banking in an Era of Deregulation* 188 (1984); P. Oppenheim, *International Banking* 146 (3d ed. 1978); S. Robinson, *Multinational Banking* 162 (1972); M. Friedman, *The Euro-Dollar Market: Some First Principles*, in *The Eurodollar* 273, 275 (H. Prochnow ed. 1970); Harfield, *International Money Management: The Eurodollar*, 89 Banking L.J. 579, 585 (1972). WFAL's expert witness, Professor Gunter Dufey, agreed that "[a] Eurodollar deposit is a time deposit denominated in U.S. dollars in a bank or bank branch located outside the United States." Tr. 632.

the maturity date (December 1983). In accordance with the customs of the Eurodollar market, the parties exchanged brief computer-generated telex messages confirming those terms. The telexes also provided remittance instructions for accomplishing transfer of the funds. As in the case of most Eurodollar transactions, the transfer was to be cleared through the parties' correspondent New York City banks. Pet. App. 13a-15a, 29a-30a, 38a-40a.

The transfer of funds from WFAL to Citibank/Manila proceeded routinely.[5] Prior to maturity, however, the Philippine government imposed emergency economic regulations that prevented Citibank/Manila from repaying the deposits. Specifically, the Philippine Board issued a Memorandum to Authorized Agent Banks (MAAB 47) requiring that "remittance of foreign exchange for repayment of principal on all foreign obligations due to foreign banks and/or financial institutions, irrespective of maturity, shall be submitted to the Central Bank * * * for prior approval." Pet. App. 15a. The Philippine Central Bank interpreted that decree to prohibit Citibank/Manila from repaying WFAL using its Philippine assets, and Citibank/Manila thereafter failed to repay WFAL's deposits at their stated maturity. *Id.* at 15a, 30a.

3. WFAL commenced this action against Citibank on February 10, 1984, in the United States District Court for the Southern District of New York, to obtain repayment of its Citibank/Manila deposits. Citibank/Manila obtained permission from the Philippine Central Bank

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[5] WFAL, which maintained a correspondent account at the New York City office of Wells Fargo Bank, N.A., instructed that office to transfer $2 million from the WFAL account to Citibank/Manila's correspondent account at the New York City office of Citibank. The correspondent banks then effected the transfer through the New York Clearing House Association's Interbank Payments System (CHIPS), a clearing mechanism that, among other things, permits member banks and other participants to credit and debit interbank dollar payments electronically and provides virtually instantaneous transfers of funds. See Pet. App. 13a-15a, 29a-30a, 39a-40a.

to repay the deposits—to the extent Citibank/Manila could—through use of Citibank/Manila's non-Philippine dollar-denominated accounts. As a result, Citibank/Manila was able to repay $934,000 of the $2 million owed. In addition, the Philippine Central Bank has permitted Citibank/Manila to reconvert sufficient pesos into dollars to make interest payments on the remaining principal. WFAL seeks return of the unpaid portion of the principal. Pet. App. 15a-16a, 30a.

WFAL moved for summary judgment, but the district court denied WFAL's motion (Pet. App. 64a-77a), conducted a bench trial (*id.* at 52a-62a), and entered judgment requiring Citibank's home office to repay the remaining balance of the deposits (*id.* at 63a). The district court assumed that Philippine law governed this action (*id.* at 53a-54a) and, after reviewing the parties' conflicting affidavits concerning the law of that country, "conclude[d] that under Philippine law Citibank's worldwide assets are available for satisfaction of plaintiff's claim" (*id.* at 59a).

Citibank appealed, and the court of appeals issued an unpublished order remanding the case for clarification of certain matters. Pet. App. 49a-51a. Specifically, the court of appeals ordered the district court to make supplemental findings of fact and conclusions of law as to several questions, including whether the parties agreed as to where the debt could be repaid, and what law applies in the absence of controlling Philippine law. *Id.* at 50a. On remand, the district court answered those questions and adhered to its previous judgment. *Id.* at 36a-48a.

In response to the first question, the district court concluded, based on remittance instructions contained in the Citibank/Manila and WFAL telex confirmations, that the parties had "agree[d] that repayment was to occur in New York." Pet. App. 40a. It distinguished, however, "repayment" from "collection" and concluded that the parties had reached no agreement as to where the debt

was collectible. *Id.* at 41a.[6] In answer to the second question, the district court decided that New York law, rather than Philippine law, was controlling. *Id.* at 44a.[7]

The district court ruled that New York law required Citibank to make a good faith effort "to seek the [Philippine] government's consent to use the assets booked at Citibank's non-Philippine offices." Pet. App. 47a. It found that Citibank had failed to make that effort. *Ibid.*; see also *id.* at 61a. The district court accordingly concluded that "Citibank is liable for the debt of its Manila branch and [WFAL] is entitled to look to Citibank's worldwide assets for satisfaction of its deposits." *Id.* at 47a.

Citibank renewed its appeal, and the court of appeals affirmed the district court's judgment, but on a different rationale. Pet. App. 27a-34a. Citing general banking law principles, the court of appeals concluded that ordinarily a party who makes a deposit with a foreign branch may demand repayment only at that branch. *Id.* at 31a-32a. The court also recognized, however, that the party may alter that "normal limitation" through agreement with the bank. *Id.* at 32a-33a. Applying those principles, the court concluded that Citibank and WFAL had reached such an agreement and that WFAL was "entitled to col-

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[6] The district court's terminology has introduced confusion into the case. The court used the term "place of repayment" to describe what is known in banking law as the place of remittance of funds; it used the term "place of collection" to describe what is known in banking law as the place where the account is payable. Compare *Callejo* v. *Bancomer, S.A.*, 764 F.2d 1101, 1124-1125 (5th Cir. 1985), with Pet. App. 38a. See also *id.* at 22a.

[7] The court reasoned that to maintain New York's "preeminent financial position, it is important that the justified expectations of the parties to the contract be protected" and that "these expectations will be best promoted by applying a uniform rule of New York law where, as here, the transactions were denominated in United States dollars and settled through the parties' New York correspondent banks, and where the defendant is a United States bank with headquarters in New York." Pet. App. 44a.

lect the deposits out of Citibank assets in New York." *Id.* at 33a-34a.

This Court vacated the court of appeals' judgment and remanded the case for further proceedings. Pet. App. 12a-26a. The Court concluded that the court of appeals had based its ruling on the mistaken factual premise that Citibank and WFAL had agreed to permit collection of the deposits from Citibank's New York assets. *Id.* at 18a-20a. This Court explained that the district court had expressly determined that the parties had not reached agreement on the place of "collection," *id.* at 21a, that the district court's determination was not "clearly erroneous," *id.* at 21a-23a, and that, given the district court's findings, "the question becomes whether collection is permitted nonetheless by rights and duties implied by law," *id.* at 23a.

This Court observed that WFAL attempted to defend the court of appeals' judgment "under principles of either New York or Philippine law." Pet. App. 23a. The Court found it "unclear" what law the court of appeals found to be controlling. *Id.* at 23a-24a. It noted that although WFAL contended that the court of appeals' opinion relied on New York law, "[w]e do not think that this is a fair or necessary construction of the opinion." *Id.* at 24a. This Court accordingly remanded the case for the court of appeals "to determine which law applies and the content of that law." *Ibid.* It added that if the court of appeals "is of the view that the controlling rule is supplied by Philippine law or, as Citibank would have it, by a federal common law rule respecting bank deposits, it should make that determination, subject to any further review [this Court] deem[s] appropriate." *Ibid.*

On remand, the court of appeals affirmed the district court's previous decision that New York law governs WFAL's claim and that, under New York law, Citibank was not excused from repaying the deposits. Pet. App. 1a-11a. The court of appeals quoted at length from the district court's choice of law analysis and endorsed its reasoning that New York law should be applied to main-

tain New York's "preeminent financial position" and to protect the "justified expectations of the parties to the contract." *Id.* at 6a-8a, 9a. See note 7, *supra*. The court of appeals flatly rejected Citibank's assertion (which the United States supported as amicus curiae) that federal law governed the question whether Citibank is obligated to use its home office assets to repay foreign branch deposits. *Id.* at 9a-10a.

Applying New York law, the court of appeals endorsed the district court's conclusion that Citibank was obligated to repay the deposits, because Citibank "had not satisfied its good faith obligation to seek the [Philippine] government's consent to use the assets booked at Citibank's *non-Philippine* offices." Pet. App. 9a (emphasis added). The court of appeals further stated:

> We conclude that under New York law, unless the parties agree to the contrary, a creditor may collect a debt at a place where the parties have agreed that it is repayable. In applying this principle to the circumstances of the present case to affirm the judgment in favor of WFAL, we do not assume the existence of an agreement between Citibank/Manila and WFAL to permit collection in New York; rather, in light of the express finding of the district court that the parties had no agreement as to permissible situses of collection, we rely on the absence of any agreement forbidding the collection in New York.

Id. at 10a.[8]

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[8] The court of appeals also noted that WFAL had submitted evidence at the appellate stage showing that the Philippine government had allowed Citibank to remit profits from its Manila branch to Citibank's home office. Pet. App. 10a-11a. The court of appeals found it unnecessary to resolve whether WFAL was entitled to repayment from the remitted profits, but suggested that the evidence "appears to support the district court's finding, if further support were needed, that Citibank in fact did not satisfy its good faith obligation to seek that government's approval of repayment of WFAL's deposits to WFAL." *Id.* at 11a.

DISCUSSION

Citibank seeks resolution of a fundamental question concerning international banking operations—whether a U.S. bank may be held liable for deposits placed with a branch in a foreign country when the foreign government prevents the branch from repaying those deposits. This Court's previous decision in this case corrected the court of appeals' mistaken understanding of the district court's ruling and remanded this case for resolution of the pertinent legal questions. The court of appeals has now addressed those questions and resolved them erroneously. This Court should grant the petition for a writ of certiorari, correct those errors, and clarify the governing principles in this important area of law.

1. This case raises legal issues of great commercial and regulatory consequence. Congress has authorized creation of foreign branches to perform functions in furtherance of "foreign commerce" and "as fiscal agents of the United States." 12 U.S.C. 601. As Citibank recites, U.S. banks currently have more than 800 foreign branches in 71 different countries with outstanding deposit obligations of approximately $300 billion. Pet. 2. History has demonstrated that those branches, located on foreign soil, are subject to the vagaries of foreign law. During periods of political or economic instability, foreign governments frequently prevent such branches from repaying depositors, through expropriation of assets or through government enforced limitations on repayment.[9]

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[9] See, *e.g.*, *Braka* v. *Bancomer, S.N.C.*, 762 F.2d 222 (2d Cir. 1985) (Mexican repayment restrictions); *Allied Bank International* v. *Banco Credito Agricola de Cartago*, 757 F.2d 516 (2d Cir.) (Costa Rican repayment restrictions), cert. dismissed, 473 U.S. 934 (1985); *Garcia* v. *Chase Manhattan Bank, N.A.*, 735 F.2d 645 (2d Cir. 1984) (Cuban expropriation); *Vishipco Line* v. *Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981) (Vietnamese expropriation), cert. denied, 459 U.S. 976 (1982); *Tillman* v. *National City Bank*, 118 F.2d 631 (2d Cir.) (Soviet Union expropriation), cert. denied, 314 U.S. 650 (1941).

The question whether a U.S. bank may be held liable for deposits placed with its foreign branches in those circumstances is a matter of obvious importance to the banking and financial services community. If a U.S. bank's home office is liable when a foreign government encumbers the bank's foreign branch deposits, then that bank will be subject to new and unforeseeable liabilities arising from the unpredictable actions of foreign governments. The matter is no less important to the federal bank regulatory agencies, which regulate banking operations and insure deposits based, in part, on the institutions' potential liabilities. As this Court's previous decision in this case has recognized, it is also a matter that has generated controversy and confusion in the financial services community and among the courts. Pet. App. 22a-23a, 24a.[10]

The Court's prior decision has focused the inquiry. As the Court recognized, parties to a banking transaction

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[10] The Court observed that "[a] fair reading of all of the testimony supports the conclusion that, at least in this trial, on the issue of the allocation of sovereign risk there was a wide variance of opinion in the international banking community." Pet. App. 23a. The Court also noted that the court of appeals' previous holding in *Garcia, supra*, that a home office is liable for expropriated foreign branch deposits, conflicts with the New York Court of Appeals' decision in *Perez* v. *Chase Manhattan Bank, N.A.*, 463 N.E.2d 5 (N.Y.), cert. denied, 469 U.S. 966 (1984). "In that case, the New York Court of Appeals was explicit in pointing out that its decision was in conflict with that reached two days earlier by the Second Circuit in *Garcia, supra*, a case that the *Perez* court deemed 'similar on its facts.'" Pet. App. 24a. Commentators have noted the confused state of the law in this area. See, *e.g.*, Smedresman & Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 N.Y.U. L. Rev. 733 (1989). Additionally, Citibank's current petition for a writ of certiorari presents the fourth instance in which this Court has invited the United States to address the matter. See Brief of the United States as Amicus Curiae in *Citibank, N.A.* v. *Wells Fargo Asia Ltd.*, cert. granted, 493 U.S. 990 (1989), and decision vacated, 495 U.S. 660 (1990); Brief of the United States as Amicus Curiae in *Citibank, N.A.* v. *Trinh*, cert. denied, 496 U.S. 912 (1990); Brief of the United States as Amicus Curiae in *Chase Manhattan Bank, N.A.* v. *Vishipco Line*, cert. denied, 459 U.S. 976 (1982).

can, in many cases, resolve the question of home office liability by agreement. Pet. App. 19a. The interbank Eurodollar market, however, does not operate on the basis of such agreements. In Eurodollar transactions, like the deposits here, financial institutions transfer large sums of money throughout the world, virtually instantaneously, based on terse oral agreements among money managers and brokers respecting interest rates and maturity dates. This fast-paced international market, which operates much like a securities or commodities exchange, does not provide for negotiated agreements to resolve contingencies, such as collection of foreign branch deposits in the event of foreign sovereign interference. As the Court recognized, when the parties have failed to resolve such matters by agreement, the appropriate legal system—either federal, state, or foreign—will provide the governing rule. *Ibid.*

This Court concluded that "there was no agreement between the parties respecting collection from Citibank's general assets in New York" and that "the question becomes whether collection is permitted nonetheless by rights and duties implied by law." Pet. App. 23a. The Court remanded the case to the court of appeals specifically "to determine which law applies, and the content of that law," subject to "any further review we deem appropriate." *Id.* at 24a. Thus, the Court charged the court of appeals with responsibility to determine what law should govern a U.S. bank's obligation to repay foreign branch deposits when the parties have reached no agreement on the subject. In response, the court of appeals issued a cursory decision that, as we explain below, has simply added to the longstanding confusion among the courts.

2. In determining "which law applies," the court of appeals endorsed the district court's conclusion that a uniform rule of New York law governs the transactions at issue here, because such a rule is necessary to maintain New York's "preeminent financial position" by protecting the "justified expectations of the parties to the

contract." Pet. App. 7a. This is a remarkable approach. It is both unusual and parochial to select the applicable law based on preservation of the "financial position" of a particular financial center. Curiously, the courts cited no evidence as to the actual expectations of the parties concerning what law would control. The district court had cited other factors, noting that (1) the transactions are denominated in dollars; (2) the funds are remitted through New York banks; (3) Citibank's headquarters are in New York; and (4) a need exists for a uniform rule. Pet. App. 7a, 44a. But those factors are by no means the only pertinent considerations. And, for its part, the court of appeals engaged in no independent analysis of the choice of law issue. Its resolution of that issue is, at a minimum, inadequate.

Assuming *arguendo* that New York law applies, the court of appeals' determination of the "content of that law" is plainly flawed. The court of appeals concluded that New York law required Citibank to use its home office assets to repay the Citibank/Manila deposits because "Citibank 'had not satisfied its good faith obligation to seek the [Philippine] government's consent to use the assets booked at Citibank's non-Philippine offices,' " viz., assets booked at its *home office*. Pet. App. 9a.[11] There is no reason in law or logic, however, why Citibank should be held liable for failure to seek the Philippine government's permission to use its New York assets to repay

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[11] The district court had specifically stated:

> It is not disputed that Citibank sought but did not obtain approval for its Manila branch to use its Philippine (or local) assets toward repayment of the Deposits. It is further undisputed that Citibank applied for and did receive Central Bank permission for its Manila branch to repay foreign depositors to the extent of the non-Philippine assets carried on the books of that branch. This approval resulted in the partial repayment of $934,000. However, no permission was ever sought to use the third category of assets here at issue, namely, assets booked at Citibank's offices outside the Philippines.

Pet. App. 47a; see also *id.* at 61a.

the Citibank/Manila deposits, particularly when Citibank has consistently argued that it is under no legal obligation to use those assets to repay those deposits.[12]

The court of appeals' additional rationale—that Citibank is liable to repay the Citibank/Manila deposits from its New York assets in "the absence of any agreement forbidding the collection in New York" (Pet. App. 10a)—is a startling and unexplained departure from its previous decision. As this Court observed in reviewing that decision, the court of appeals recognized the "general banking law principle" that "in the ordinary course, a party who makes a deposit with a foreign branch of a bank can demand payment of the deposit only at that branch." *Id.* at 18a; see *id.* at 32a. The court of appeals' latest decision rejects the settled banking law principle that the court itself had previously cited, and its decision also exacerbates the existing conflict between the court of appeals' decision in *Garcia* and the New York Court of Appeals' decision in *Perez*. See Pet. App. 24a.[13]

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[12] WFAL makes much of the fact that the Philippine government debt restructuring agreements have allowed Citibank/Manila to remit profits to its home office, while keeping in place the restrictions on repayment of dollar-denominated deposits. See Br. in Opp. 4, 6, 9, 26-27. The question, however, is not whether the Philippine government's restrictions are fair, but rather whether they are binding on the deposit transaction at issue here.

[13] The court of appeals' decision is also in tension with numerous other New York decisions. See, *e.g.*, *Dougherty* v. *Equitable Life Assurance Society*, 193 N.E. 897 (N.Y. 1934) (life insurance company); *Trujillo-M* v. *Bank of Nova Scotia*, 273 N.Y.S.2d 700 (Sup. Ct. 1966), aff'd. 289 N.Y.S.2d 389 (App. Div.), cert. denied, 393 U.S. 982 (1968); *Dougherty* v. *National City Bank*, 285 N.Y.S. 491 (Sup. Ct. 1935); see also *Tillman* v. *National City Bank*, 118 F.2d 631 (2d Cir.), cert. denied, 314 U.S. 650 (1941). Indeed, the court of appeals has transformed what was once a troubling exception to a general principle, see, *e.g.*, *Trinh* v. *Citibank, N.A.*, 850 F.2d 1164, 1168 (6th Cir. 1988) ("the bank is surely correct in arguing that absent special circumstances, deposits made payable in branch banks are payable only there"), cert. denied, 496 U.S. 912 (1990), into an expansive new rule.

3. This Court's review is needed to correct the court of appeals' flawed decision; to close the widening gulf between that court and the New York Court of Appeals on the issue; and to clarify the legal principles that govern this important area of law. The court of appeals' decision applies principles that are inconsistent with established legal rules governing international banking transactions. If the court of appeals' decision is left uncorrected, the United States will be required to make fundamental adjustments in its federal bank regulatory programs, including regulations governing reserve requirements and deposit insurance.

The initial question is what legal system should determine a U.S. bank's liability for its foreign branch deposits. The courts below correctly recognized that it is proper to use federal choice of law principles to answer that question. Pet. App. 6a-7a. WFAL invoked the district court's jurisdiction based, in part, on Section 25 of the Federal Reserve Act, as amended (the Edge Act), which confers original jurisdiction on the court over suits "arising out of transactions involving international or foreign banking." 12 U.S.C. 632. See Pet. App. 43a. Because Congress has directed that such disputes shall be heard in a federal forum, federal law should provide the relevant choice of law rules.[14]

The Second Restatement of Law (Conflicts), which both federal and New York courts have cited approvingly, articulates the appropriate federal choice of law rule:

> The validity of a contract for the payment of money lent and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the contract requires that repayment be made, unless, with

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[14] See *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-497 (1941); *Aaron Ferer & Sons Ltd.* v. *Chase Manhattan Bank, N.A.*, 731 F.2d 112, 120-121 (2d Cir. 1984); *Corporacion Venezolana de Fomento* v. *Vintero Sales Corp.*, 629 F.2d 786, 794-795 (2d Cir. 1980), cert. denied, 449 U.S. 1080 (1981); Pet. App. 6a.

> respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 [of the Restatement].

1 Restatement (Second) of Conflict of Laws § 195 (1971).[15] The Restatement's reference to the place of repayment plainly refers to where the account is legally payable—"collectible" in the parlance of the district court—and not merely where the funds might be remitted for the convenience of the depositor. See *Callejo* v. *Bancomer S.A.*, 764 F.2d 1101, 1124 (5th Cir. 1985).

Although Citibank and WFAL reached no specific agreement as to whether WFAL could collect the deposits in New York, the parties have not disagreed that, in the absence of the Philippine government's restrictions, WFAL could obtain repayment of the deposits at Citibank/Manila, the branch where it deposited the funds. As the Restatement commentary explains:

> Money lent by a bank or deposited in a bank is usually repayable at the bank itself or, when the bank has branches, at the branch with which the customer dealt. In the absence of an effective choice of law by the parties, the state of the applicable law in such instances will almost invariably be the state where the bank, or the particular branch thereof, is located.

Id. § 195 cmt. d. Thus, under Restatement principles, the law of the Philippines—which controls "the branch with which the customer dealt"—governs the deposit relationship "unless, with respect to the particular issue, some

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[15] Section 6 identifies the following factors: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. 1 Restatement (Second) of Conflicts of Laws § 6 (1971).

other state has a more significant relationship." The relevant Philippine law includes MAAB 47, which restricts repayment of the Citibank/Manila deposits.[16]

Although the Restatement formulation indicates that Philippine law generally governs the Citibank/Manila deposits, it does not dictate that Philippine law should govern the "particular issue" here—whether Citibank's home office must repay the restricted Citibank/Manila deposits when the parties have reached no agreement on the matter. The United States has by far the most "significant relationship" to the issue. The United States charters and pervasively regulates U.S. banks, and it has a uniquely federal interest in and control over their foreign branch operations. See, *e.g.*, 12 U.S.C. 601 *et seq.* (authorizing the establishment of foreign branches). The United States' interest is particularly strong with respect to the issue of a U.S. bank's home office liability for expropriated or restricted foreign branch deposits, because expropriations and restrictions are frequently the consequence of foreign turmoil and may have foreign relations consequences. Additionally, such foreign actions can affect the United States' programs for insuring deposits and regulating the safety and soundness of U.S. banking operations. Thus, a compelling basis exists for applying a federal rule of law to govern whether a U.S. bank's home office is liable for expropriated or restricted foreign branch deposits when it has not expressly assumed that obligation.[17]

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[16] The Senior Deputy Governor of the Central Bank of the Philippines has described the controlling Philippine law as follows:

> Unless the deposit contract otherwise specifies, deposits placed with the Manila branch of Citibank are payable at that branch. The branch, and its obligations, are subject to regulations of the Central Bank, including MAAB 47.

Citibank C.A. Br. Add. A (Nov. 16, 1987).

[17] Cf. *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 504 (1988); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 426-427 (1964); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367

The rationale for determining a U.S. bank's home office liability based on federal law is especially powerful, because the United States has addressed the issue through its statutes and regulations and the way in which it administers its bank regulatory programs. As we explained, pp. 2-4, *supra*, Congress and the Federal Reserve Board—to preserve the competitiveness of U.S. banking interests overseas—have specifically exempted deposits that are payable only abroad from certain requirements applicable to deposits payable in this country, such as reserve requirements and federal deposit insurance assessments. See 12 U.S.C. 461(b)(6); 12 U.S.C. 1813(*l*)(5)(A); 12 C.F.R. 204.1(c)(5) and 204.128. In promulgating and implementing those exemptions, the federal banking agencies faced the same question presented here: whether in the absence of an agreement, foreign branch deposits are subject, as a matter of law, to payment (*i.e.*, "collection") in this country. The agencies have adopted and long employed a rule that, unless the parties agree otherwise, a foreign branch deposit is payable only abroad.[18]

(1943); *D'Oench, Duhme & Co.* v. *FDIC*, 315 U.S. 447, 457-458 (1942).

[18] For example, the Federal Reserve Board's regulations state that reserve requirements "do not apply to any deposit that is payable only at an office outside of the United States." 12 C.F.R. 204.1(c)(5). The regulations recognize, however, that this exemption is not available if the bank agrees to repay the deposit in the United States. 12 C.F.R. 204.128. The regulations explain:

> A customer who makes a deposit that is payable solely at a foreign branch of the depository institution assumes whatever risk may exist that the foreign country in which a branch is located might impose restrictions on withdrawals. *When payment of a deposit in a foreign branch is guaranteed by a promise of payment at an office in the United States if not paid at the foreign office, the depositor no longer assumes this risk* but enjoys substantially the same rights as if the deposit had been made in a U.S. office of the depository institution.

12 C.F.R. 204.128(c) (emphasis added). See generally Logan & Kantor, *Deposits at Expropriated Branches of U.S. Banks*, 1982

The United States' incorporation of that simple, clear, and uniform rule into the federal regulatory scheme establishes a federal policy concerning the relationship between U.S. banks and their foreign branch depositors that should control this case: the United States banking system and its constituent banks are not responsible for foreign sovereign action that affects the ability of a foreign branch to repay deposits placed in that branch, unless the depositor enters into a contrary agreement with the bank. The federal rule, derived from the common law, is consistent with widely accepted general banking law principles.[19] That rule is easy to apply, and it serves an important practical function in facilitating administration of the federal deposit insurance program and simplifying federal bank examinations. In addition, it is consistent with laws of other jurisdictions.[20] Indeed, the

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U. Ill. L. Rev. 333, 335-336. The court of appeals mistakenly suggested that a different federal regulation, 12 C.F.R. 204.2(t), rendered deposits payable in the United States *unless* the deposit agreement expressly made them exclusively payable abroad. Pet. App. 10a. As Citibank correctly explains, Pet. 15-17, the court misread that regulation, which simply clarifies that foreign branch deposits by United States residents in amounts less than $100,000 are not entitled to the reserve exemption. See Pet. App. 90a-94a.

[19] See, *e.g.*, *United States* v. *First Nat'l City Bank*, 321 F.2d 14, 19-22 (1963), aff'd en banc, 325 F.2d 1020 (2d Cir. 1964), rev'd on other grounds, 379 U.S. 378 (1965). The common law courts developed the principle partly in response to the perceived "impracticality of requiring constant transmission of reports on the status of accounts in one branch to all other branches." *First Nat'l City Bank*, 321 F.2d at 22. The more enduring justification in the age of modern telecommunications rests, however, "on the complications that arise out of the fact that different branches may be subject to the laws of other countries and may be dealing in different currencies." *Ibid.*

[20] See, *e.g.*, *Joachimson* v. *Swiss Bank Corp.*, [1921] 3 K.B. 110, 127 ("promise to repay is to repay at the branch of the bank where the account is kept"); *Dame Ba Tu Thu Van* v. *Banque National de Paris*, Tribunal de grande instance de Paris, 9éme Chambre (Mar. 8, 1985), *reported in* Recueil Dalloz Sirey 500-501 (1985). See also Smedresman & Lowenfeld, *supra*, 64 N.Y.U. L. Rev. at 782-783 (discussing French cases and commentary).

same result would obtain under a proper application of Philippine or New York law.[21]

We submit that the court of appeals erred both in its determination of applicable law and its analysis of the content of that law. A federal rule should control the issue in this case. Under that rule, a U.S. bank should not be held liable to repay an expropriated or restricted foreign branch deposit from its home office assets unless the parties have specifically agreed to such repayment. There is a genuine need for this Court to clarify this important point of law.[22]

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[21] The Senior Deputy Governor of the Central Bank of the Philippines described the analogous Philippine rule as follows:

> Both MAAB 47 and the Standstill Telex suspended temporarily the payment of foreign currency obligations due to foreign banks and financial institutions, except to the extent the Central Bank authorized repayment. Under such circumstances, there is no obligation imposed under Philippine law on a foreign bank to remit funds to its Philippine branch to pay deposits whose payment has otherwise been temporarily suspended as aforesaid stated. Nor is there an obligation imposed under Philippine law that the foreign bank pay the Philippine branch deposits in those circumstances at branches outside of the Philippines.

See Citibank C.A. Br. Add. A (Nov. 16, 1987). New York law, properly applied, produces the same result. See cases cited at note 13, *supra*.

[22] Citibank has advised us that recent changes in the Philippine government's foreign exchange resources and policies raise the possibility that the Philippine government may authorize early repayment of the Citibank/Manila deposits, but it is unclear at this time what action, if any, the Philippine government may take. In the event that the Philippine government allows Citibank/Manila to repay WFAL, the issues in this case would become moot. Given the importance of the issue, in the event of mootness, the petition for a writ of certiorari should be granted, the court of appeals' decision should be vacated, and the case should be remanded for dismissal. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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